

Before the
Federal Communications Commission
Washington, D.C. 20554

2001 JAN 23 P 4: 09

In the Matter of)
)
Mescalero Apache Telecom, Inc.)
)
Waiver of Section 54.305 of the Commission's)
Rules)
)
)

CC Docket No. 96-45

IVED

ORDER**Adopted:** January 11, 2001**Released:** January 18, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we grant a request from Mescalero Apache Telecom, Inc. (Mescalero), a newly-formed tribally-owned carrier, for a waiver of section 54.305 of the Commission's rules.¹ This waiver will enable Mescalero to receive high-cost universal service support based on the average cost of the 950 access lines acquired from Valor Telecommunications of New Mexico, LLC (Valor). These access lines serve the newly established study area within the Mescalero Apache Reservation in New Mexico.² Absent this waiver, Mescalero would receive the per-line level of high-cost universal service support that Valor received for the lines prior to the transfer.

2. The grant of this waiver will enable Mescalero to fulfill its commitment to bring basic service to all unserved residences on the Reservation in its first two years of operation, as well as permit Mescalero to expand service in underserved areas of the Reservation. According to Mescalero, more than fifty percent of the residences on the Reservation are without telephone service.³ As the Commission previously concluded, enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, increases tribal communities' access to education, commerce, government, and public services.⁴ By

¹ Mescalero Apache Telecom Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Mescalero Apache Telecom Inc., Related Waivers of Parts 36, 54, 61 and 69 of the Commission's Rules (filed June 30, 2000) (Petition). The Common Carrier Bureau addresses waiver of Parts 36, 61, and 69 of the Commission's rules in a companion order adopted today.

² For purposes of its petition, Mescalero defines "Reservation" as the Mescalero Apache Reservation and the reservation controlled lands including the Ski Apache area. See Petition at 1. See also Letter from James A. Casey, Mescalero Apache Telecom, Inc., to Magalie Roman Salas, FCC, dated December 4, 2000 (Mescalero *ex parte*) at 3.

³ Mescalero *ex parte* at 3.

⁴ See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, (continued....)

helping to bridge the physical distances between those living on the Reservation and the emergency, medical, employment, and other services that they may need, our action here will help improve the Mescalero Apache community's standard of living.

II. BACKGROUND

A. Section 54.305 Transfer of Universal Service Support

3. Section 54.305 of the Commission's rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.⁵ For example, if a rural carrier purchases an exchange from a non-rural carrier that receives support based on our new universal service support mechanism for non-rural carriers,⁶ the loops of the acquired exchange receive the same per-line support as calculated under the new non-rural mechanism, regardless of the support that the rural carrier purchasing the exchange may receive for any other exchanges.⁷ In adopting section 54.305, the Commission sought to ensure that a selling carrier does not artificially inflate the price of an exchange in anticipation of the buyer's receipt of increased universal service support as a result of the transfer.⁸ High-cost support mechanisms currently include non-rural carrier forward-looking high-cost support,⁹ interim hold-harmless support for non-rural carriers,¹⁰ rural carrier high-cost loop support,¹¹ local

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Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, para. 23, (rel. Jun. 30, 2000) (*Twelfth Report and Order*), stayed in part by *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Order and Further Notice of Proposed Rulemaking, FCC 00-322 (rel. Aug. 31, 2000), as corrected by Errata, CC Docket No. 96-45, DA 00-2128 (Com Car. Bur. rel Sep. 20, 2000).

⁵ 47 C.F.R. § 54.305.

⁶ On November 2, 1999, the Commission released two orders finalizing implementation plans for high-cost reform for non-rural carriers. *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, CC Docket No. 96-45, FCC 99-306 (rel. Nov. 2, 1999); *Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket Nos. 96-45, 97-160, Tenth Report and Order (rel. Nov. 2, 1999). The new mechanism, which went into effect on January 1, 2000, does not apply to rural carriers.

⁷ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8942-43 (1997) (*First Report and Order*), as corrected by *Federal-State Joint Board on Universal Service*, Errata, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), affirmed in part, reversed in part and remanded in part sub nom. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *First Report and Order* in part and reversing and remanding on unrelated grounds), cert. denied in *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), pet. for cert. withdrawn in *GTE Service Corp. v. FCC*, 120 S. Ct. 2214 (June 5, 2000), cert. denied in *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000).

⁸ See, e.g., *id.*

⁹ See 47 C.F.R. § 54.309.

¹⁰ In the event that support provided to a non-rural carrier in a given state is less under the forward-looking methodology, the carrier is eligible for interim hold-harmless support, which is equal to the amount of support for which the non-rural carrier would have been eligible under the Commission's existing high-cost support mechanism. See 47 C.F.R. § 54.311. On December 6, 2000, the Commission adopted the recommendations of the Federal-State Joint Board on Universal Service for phasing down interim hold-harmless support for non-rural carriers. Specifically, the Commission adopted measures to phase down interim hold-harmless support, excluding (continued....)

switching support,¹² and Long Term Support (LTS).¹³ To the extent that a carrier acquires exchanges receiving any of these forms of support, the acquiring carrier will receive the same per-line levels of support for which the acquired exchanges were eligible prior to their transfer.¹⁴

B. The Petition

4. On June 30, 2000, Mescalero, GTE Southwest Incorporated (GTE), and Valor filed a joint petition for waiver of various Commission rules in order to effectuate Mescalero's acquisition of 950 access lines forming the nucleus of Mescalero's operations on the Reservation.¹⁵ Mescalero seeks a waiver of section 54.305 to receive high-cost support based on the average cost of the acquired access lines under its ownership, rather than the per-line level of support for which the acquired lines were eligible prior to their transfer.¹⁶ Mescalero estimates that it would receive, on average, an additional

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LTS, through \$1.00 reductions in average monthly, per-line support beginning January 1, 2001, and every year thereafter until there is no more interim hold-harmless support. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Thirteenth Report and Order and Further Notice of Proposed Rulemaking, FCC 00-428 (rel. December 8, 2000).

¹¹ Rural carriers receive high-cost loop support when their reported average cost per loop exceeds the nationwide average loop cost by fifteen percent. *See* 47 C.F.R. §§ 36.601-36.631.

¹² Incumbent LECs that are designated eligible telecommunications carriers and serve study areas with 50,000 or fewer access lines receive support for local switching costs. 47 C.F.R. § 54.301. Local switching support enables participants to assign a greater proportion of local switching costs to the interstate jurisdiction.

¹³ Carriers that participate in the NECA common line pool are eligible to receive LTS. *See* 47 C.F.R. § 54.303. LTS supports interstate access rates for carriers that are members of the NECA pool, by reducing the amount of interstate-allocated loop costs that such carriers must recover through carrier common line charges. *See First Report and Order*, 12 FCC Rcd at 9163-9165.

¹⁴ As described in our recent order adopting an integrated interstate access reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service (CALLS), beginning July 1, 2000, if a price cap LEC acquires exchanges from another price cap LEC, the acquiring carrier will become eligible to receive interstate access universal service support for the acquired exchanges. *See Access Charge Reform*, Sixth Report and Order in CC Docket No. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, FCC 00-103, at para. 225 (rel. May 31, 2000) (*Interstate Access Universal Service Order*). Because the interstate access universal service support mechanism is capped at \$650 million, transactions involving the transfer of support will not increase the mechanism's overall size. *See* 47 C.F.R. § 54.801(a); *see also Interstate Access Universal Service Order* at para. 201. If a non-price cap LEC acquires exchanges from a price-cap LEC, per-line interstate access universal service support will not transfer. Section 54.801 of the Commission's rules states that, if "all or a portion of a study area served by a price cap LEC is sold to an entity other than a price cap LEC, . . . then the support that would otherwise be provided under this subpart, had such study area or portion thereof not been sold, will not be distributed or collected." 47 C.F.R. § 54.801(b).

¹⁵ *See* Petition at 1-2. Mescalero has an agreement to acquire 950 access lines from GTE. These access lines also are included in a transfer of GTE's New Mexico study area to Valor. According to the petitioners, GTE's transaction with Valor will close prior to the sale of the access lines to Mescalero. *See* Petition at 2. At that time, GTE will have no further interest in the access lines. Therefore, the access lines will transfer from Valor to Mescalero upon Mescalero receiving final state and federal approvals.

¹⁶ In addition to waiver of section 54.305, Mescalero, GTE and Valor seek waiver of the definition of "study area" contained in the Part 36 Appendix-Glossary of our rules. The requested waiver would permit Valor to alter the boundaries of a New Mexico study area it is acquiring from GTE so that it can transfer to Mescalero the 950 (continued....)

\$1,790,000 annually in high-cost support over its first three years of operation.¹⁷ Absent the waiver, Mescalero estimates that it would receive the approximately \$28,884 in support for which the access lines are currently eligible.¹⁸ Mescalero states that failure to waive section 54.305 will “seriously jeopardize [its] ability to fulfill its goal of providing high-quality basic and advanced telecommunications services to the Tribe and its people.”¹⁹ Moreover, Mescalero emphasizes that it will be “wholly unable to extend service to the unserved areas within the Reservation if it cannot receive USF support based on the average cost of all of its lines.”²⁰

5. On August 10, 2000, the Common Carrier Bureau released a public notice seeking comment on the petition.²¹ The Salt River Pima-Maricopa Indian Community and Saddleback Communications submitted comments in support of Mescalero’s petition.²² Salt River contends waiver of section 54.305 is necessary to enable Mescalero to provide reasonably-priced service to previously unserved and underserved areas of the reservation.²³

III. DISCUSSION

6. Generally, Commission rules may be waived for good cause shown.²⁴ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.²⁵ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent

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access lines serving the Reservation. *See* Petition at 7-11. The waiver also would permit Mescalero to establish a new study area in New Mexico for the approximately 950 access lines it intends to acquire from Valor. Mescalero also requests waivers of sections 61.41(c) and 69.3(e)(11) of our rules in order to operate under rate-of-return regulation and immediately participate in the NECA carrier common line tariff and LTS program following consummation of the proposed transaction. *See* Petition at 16-19. Finally, Mescalero requests waiver of sections 36.611 and 36.612 of our rules in order to immediately begin receiving high-cost loop support for the acquired access lines upon commencement of operations. *See* Petition at 12-15. These waivers have been granted in a companion order adopted today by the Common Carrier Bureau. *See Mescalero Apache Telecom, Inc. Waiver of Sections 61.41(c)(2), 69.3(e)(11), 36.611 and 36.612 of the Commission’s Rules*, CC Docket No. 96-45, Order, DA 01-129 (rel. January 18, 2001)

¹⁷ *See* Petition at 9.

¹⁸ *See* Petition at 9.

¹⁹ Petition at 11.

²⁰ Petition at 11-12.

²¹ *See Mescalero Apache Telecom, Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC Seek Waiver of the Definition of “Study Area” in Part 36 and a Waiver of Various of the Commission’s Rules*, Public Notice, DA 00-1824 (rel. Aug. 10, 2000).

²² Salt River Pima-Maricopa Indian Community and Saddleback Communications Comments (jointly, Salt River) (September 15, 2000).

²³ *See* Salt River Comments at 1.

²⁴ 47 C.F.R. § 1.3.

²⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

with the public interest.²⁶ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁷ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. For the reasons set forth below, we conclude that a waiver of section 54.305 of the Commission's rules is warranted in this instance.

7. We find that Mescalero has demonstrated that special circumstances warrant a deviation from our general rule. First, according to Mescalero, the percentage of residences on the Reservation without telephone service is 52 percent.²⁸ The national average penetration level for all households in the United States is 94.6 percent.²⁹ Mescalero explains that telecommunications services are only available in the higher density subscriber regions of the Reservation, and, as a result, many tribal members have no access to basic telecommunications services.³⁰ The 950 access lines acquired by Mescalero serve only 42 percent of the Reservation's population of 4000.³¹ We conclude that application of section 54.305 in this instance could have the unintended effect of preventing the expansion of service in unserved and remote areas of the Reservation, and the improvement of service in underserved areas.³²

²⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁷ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

²⁸ See *Mescalero ex parte* at 3. According to Mescalero, 537 of the 1,025 residences on the Reservation are without telephone service. See also *Application of Mescalero Apache Telecom, Inc. for Certificates of Financial and Technical Competency, Operating Authority, and Public Convenience and Necessity and for Approval of Initial Tariffs*, Utility Case No. 3364, Final Order, at 2 (N.M. Pub. Reg. Com. rel. Aug. 15, 2000) in which the New Mexico Public Regulation Commission states that the number of Mescalero Apache tribal households in Mescalero, New Mexico owning telephones is "around 46 percent."

²⁹ See *Monitoring Report*, September 2000, CC Docket No. 98-202 (rel. Nov. 9, 2000). Section 6, Subscribership and Penetration, presents comprehensive data on telephone penetration statistics collected by the Bureau of the Census under contract with the Federal Communications Commission. Table 6.1 summarizes the telephone penetration for the United States, combining information on the number of households with the penetration levels. Due to the fact that there can be multiple households per residence, a measure of subscribership in terms of residences will be equal to or less than a measure based on households.

³⁰ See *Petition* at 6.

³¹ Mescalero states that 569 of these lines are residential, noting that 80 residences have multiple lines. Mescalero *ex parte* at 3. The balance of these lines are broken down in the following manner: 356 business and/or tribal government and 26 payphone. *Id.*

³² In the *Twelfth Report and Order*, we noted that only 76.7 percent of rural households earning less than \$5,000 have a telephone, and only 47 percent of Indian tribal households on reservations and other tribal lands have a telephone in comparison to 94 percent of all households in the United States. See *Twelfth Report and Order* at para. 26 (citing *Housing of American Indians on Reservations – Equipment and Fuels*, Statistical Brief, Bureau of the Census, SB/95, April 1995 at 2 (based on 1990 Census data)). On the basis of these observations, we concluded that the extent to which telephone penetration levels fall below the national average underscored the need for immediate action to promote the deployment of telecommunications facilities in tribal areas and to provide the support necessary to increase subscribership in these areas. Toward that end, we adopted measures to promote telecommunications deployment and subscribership for the benefit of those living on federally-recognized American Indian and Alaska native tribal lands. We found the enhancement of tribal communities' access to telecommunications services, consistent with our obligations under the Act to preserve and advance universal service, and our obligations under the historic federal trust relationship between the federal government (continued....)

8. Second, Mescalero is a newly-formed, tribally-owned and operated, carrier established for the purpose of addressing the severe shortage of telecommunication services on the Reservation.³³ In addressing Mescalero's waiver request, we are mindful of our obligation to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance.³⁴ In doing so, we attempt to ensure that Indian Tribes have adequate access to telecommunications services.³⁵ By granting this waiver, the Mescalero Apache Tribe will gain control over the deployment and provision of telecommunications services on the Reservation, thereby furthering tribal self-government and self-determination. As a tribally-owned and operated carrier, Mescalero is particularly suited to understand and address the unique needs of the Mescalero Apache community and to set communications priorities and goals for the welfare of the membership. For example, Mescalero submits that it will extend lines to unserved and underserved residents in remote areas on the reservation, but will not impose line extension charges on its customers.³⁶ Such charges may present an obstacle to subscribership. As the Commission has observed previously, the extension of service to tribal communities is particularly challenging because they are among the poorest populations in the United States and, therefore, are less able to absorb the costs of extending lines to remote and high-cost areas.³⁷ We view Mescalero's plan not to assess line extension charges as demonstrating its acute awareness of the impediments to increased telecommunications and deployment on tribal lands and its commitment to overcome them.

9. Third, the high costs faced by Mescalero as a tribally-owned start-up company seeking to address the acute shortage of telecommunications services on the Reservation are unusually severe. Mescalero submits that the existing facilities, which Mescalero describes as antiquated and in poor condition, have reached capacity and cannot be expanded to serve the currently unserved areas of the reservation without first upgrading the system.³⁸ Moreover, Mescalero states that the terrain of the

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and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance. See *Twelfth Report and Order* at paras. 23, 26.

³³ See Mescalero *ex parte* at 3.

³⁴ See *Twelfth Report and Order* at paras. 5, 22-23; See also *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207, at 3 (released June 23, 2000) (Indian Policy Statement) (citing *U.S. v. Mitchell*, 463 U.S. 206 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (citing *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *United States v. Creek Nation*, 295 U.S. 103 (1935); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886)).

³⁵ Consistent with this principal, we recently developed enhanced Lifeline and Link Up programs designed to increase access to telecommunications services and subscribership among low-income individuals living on American Indian and Alaska Native lands. See *Twelfth Report and Order* at paras. 13-14.

³⁶ See Petition at 6-7.

³⁷ See *Twelfth Report and Order* at para. 27 (citing *We, the First Americans*, U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, WE-5 (Sept. 1993), at 10 (indicating per capita income in 1989 of approximately \$4,478 for American Indians residing on all reservations and trust lands); *Assessment of Technology Infrastructure in Native Communities*, Final Report, Prepared for the U.S. Department of Commerce, Economic Development Administration by the College of Engineering, New Mexico State University, June 1999 (*NMSU Report*), at 14 (unemployment levels for a sample of 48 tribes averaged 42 percent as compared to the national unemployment figure of 4.5 percent)); *Id.* at para. 60.

³⁸ See Mescalero *ex parte* at 3; Petition at 6.

Reservation is generally extremely rugged.³⁹ As a result, Mescalero explains, the projected cost of providing service and upgrading facilities on the Reservation are much higher than the cost of serving other subscribers in New Mexico and higher than for most subscribers in any other state.⁴⁰ According to Mescalero, its projected study area cost per loop of \$2,138 far exceeds the cost per loop of other New Mexico carriers, rural local exchange companies (with average costs per loop of \$741 and \$561, respectively) and most carriers in the United States.⁴¹ Mescalero indicates that for universal service calculation purposes, based on currently available data, only six cost carriers in the United States have universal service fund study area cost per loop figures higher than Mescalero's projected loop cost.⁴² Given the high costs associated with upgrading the existing facilities and extending service to unserved areas on the Reservation, we find that, without waiver of the per-line support limit, and the resulting increase in support, Mescalero is unlikely to be able to upgrade the existing facilities sufficiently to support its planned build-out to underserved and unserved areas.⁴³

10. Finally, we conclude that waiver of section 54.305 in this particular instance is in the public interest. Mescalero, a wholly-owned and operated tribal carrier, has been established to address the severe shortage of telecommunications services on the Reservation.⁴⁴ In its petition, Mescalero states that, with a waiver of section 54.305, it will improve existing services throughout the Reservation without significant increases in basic service rates.⁴⁵ More importantly, however, Mescalero commits to providing service to all unserved residences in the first two years of operation using universal service support to achieve that goal.⁴⁶ Ultimately, Mescalero intends to provide affordable services that will rival services offered in any metropolitan area.⁴⁷ Waiver of our rule in this instance will increase access to telecommunications services on the Reservation consistent with our statutory goal of preserving and advancing universal service.⁴⁸ Such a waiver is also consistent with our mandate to ensure that consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, have access to telecommunications and information services.⁴⁹

³⁹ See Mescalero *ex parte* at 4.

⁴⁰ See Mescalero *ex parte* at 3-4.

⁴¹ See Mescalero *ex parte* at 3.

⁴² See Mescalero *ex parte* at 3.

⁴³ See Mescalero *ex parte* at 4.

⁴⁴ See Mescalero *ex parte* at 3.

⁴⁵ See Petition at 6.

⁴⁶ See Mescalero *ex parte* at 3-4. Specifically, Mescalero commits to provide service to 248 unserved residences in the communities of Pena, Snow Springs, A&B Hill, Old Ladies Town, Summit, White Mountain Subdivision, New Mescalero School, Old Road, Gallarito Flats, Mud Canyon, and Pigeon Tank in the first year of operation and 289 unserved residences in the Communities of Mescalero Village and Highway 70, Cow Camp, White Tail, Silver Lakes, and Three Rivers in the second year of operations.

⁴⁷ Petition at 6.

⁴⁸ 47 U.S.C. § 254(b).

⁴⁹ *Id.*

11. We find that this result is consistent with our obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance and to ensure a standard of livability for members of Indian tribes on tribal lands.⁵⁰ By granting this waiver we will enhance Mescalero Apache tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, and thereby increase the tribal communities' access to education, commerce, government, and public services. These measures will also help bridge the physical distances between those living on the Reservation and the emergency, medical, employment, and other services that they may need to improve the standard of living on the Reservation.⁵¹ Moreover, this result will be realized under the direction of the Mescalero Apache Tribe. Accordingly, based on Mescalero's representations and commitments, and in light of the advancement of the Mescalero Apache Tribe's self-determination and self-governance, we conclude that Mescalero has demonstrated the grant of this waiver request serves the public interest.

12. We further note that waiver of section 54.305 in this instance will have minimal effect on the high-cost universal service mechanisms. We estimate that the additional support received by Mescalero as a result of this waiver will result in an annual aggregate shift that is less than one percent of any of the high-cost universal service mechanisms.⁵² This is consistent with the Commission's prior analysis of whether a transfer of exchanges has an adverse impact on the universal service support mechanisms.⁵³

⁵⁰ See *Twelfth Report and Order* at paras. 22-23.

⁵¹ See e.g., *Twelfth Report and Order* at para. 23 (citing, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Association, et al.*, 443 U.S. 658 (1979) (holding that the federal government's unique relationship with Indian tribes may create a federal duty to ensure that federal regulation of tribal lands assures "Indians with . . . a moderate living"))).

⁵² For example, Mescalero projects that it will receive \$1,512,303 in uncapped high-cost loop support for calendar year 2001 if section 54.305 is waived. See Petition at Exhibit B, Schedule 3. This is approximately two-tenths of one percent of the high-cost loop support fund which is projected to total \$919.587 million for calendar year 2001. See *Federal Universal Service Programs Fund Size Projections & Contribution Base for First Quarter 2001* (filed by USAC Nov. 2, 2000) (*USAC First Quarter 2001 Filing*), at 9. Mescalero projects that it will receive \$107,592 in local switching support for the calendar year 2001. See Petition at Exhibit B, Schedule 3. The total size of the local switching support mechanism for calendar year 2001 is projected to be \$390.836 million. See *USAC First Quarter 2001 Filing* at 10. Mescalero projects that it will receive \$575,010 in LTS for calendar year 2001. See Mescalero *ex parte* at Attachment 2. The total amount of LTS for calendar year 2001 is projected to be \$484.879 million. See *USAC First Quarter 2001 Filing* at 12.

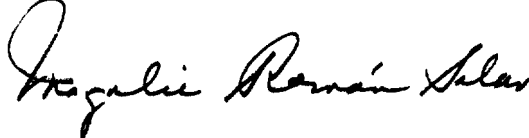
⁵³ Prior to the adoption of section 54.305, the Commission concluded that a transfer of exchanges would be deemed to have an adverse effect on universal service support mechanisms if it resulted in an annual aggregate shift in high-cost support in an amount equal to or greater than one percent of the total high-cost loop fund, unless the petitioner demonstrated an extraordinary public interest benefit. In evaluating whether a study area change would have an adverse impact on the distribution or level of the high-cost loop support fund, the Commission determined this "one-percent" guideline should be applied to study area waivers filed after January 5, 1995. See, e.g., U S WEST Communications, Inc., and Eagle Telecommunications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 (1995). Because under section 54.305 carriers purchasing high-cost exchanges can only receive the same level of per-line support as the selling carrier was receiving for those exchanges prior to the sale, there can, by definition, be no adverse impact on the universal service fund resulting from the transaction. See 47 C.F.R. § 54.305.

13. We emphasize that section 54.305 continues to serve an important purpose in the administration of high-cost universal service support. As discussed above, the Commission adopted this rule to ensure that a selling carrier does not artificially inflate the price of an exchange in anticipation of the buyer's receipt of increased universal service support as a result of the transfer.⁵⁴ The action we take here does not undermine the validity of the rule. We grant a waiver in this instance in recognition of the unique opportunity it presents to promote subscribership and infrastructure deployment on the unserved areas of the Mescalero Apache Reservation. We will not, however, routinely grant waiver of this rule and those seeking a waiver of section 54.305 will bear a heavy burden.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of section 54.305 of the Commission's rules, 47 C.F.R. § 54.305 filed by Mescalero Apache Telecom, Inc., IS GRANTED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁵⁴ See *supra* Discussion at para. 3.